

**United States District Court**  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD LEWIS ASHKER and DANNY TROXELL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. C 05-3286 CW

ORDER GRANTING IN  
PART AND DENYING IN  
PART AS MOOT  
DEFENDANTS' MOTION TO  
SCREEN COMPLAINT AND  
FINDING ALL CLAIMS  
COGNIZABLE

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Plaintiffs Todd Ashker and Danny Troxell are prisoners of the State of California who are incarcerated in the Security Housing Unit (SHU) at Pelican Bay State Prison (PBSP). Represented by counsel, they have filed this civil rights action under 42 U.S.C. § 1983 in which they seek injunctive relief and damages.

1 Defendants Arnold Schwarzenegger (Governor and Chief Executive of  
2 the State of California), Roderick Q. Hickman (Secretary of the  
3 California Youth and Adult Correctional Agency), Jeanne Woodford  
4 (Director of California Department of Corrections (CDC)), Edward  
5 Alameida (former Director of CDC), Richard Kirkland (Warden of  
6 Pelican Bay State Prison (PBSP)) and Joe McGrath (former Warden of  
7 PBSP) have filed a motion asking the Court to screen the complaint  
8 under 28 U.S.C. § 1915A.<sup>1</sup> The Court GRANTS Defendants' motion in  
9 part, DENIES it in part as moot and finds all claims cognizable.

#### 10 BACKGROUND

11 On May 19, 2004, Plaintiffs filed a complaint against Governor  
12 Arnold Schwarzenegger, former Governor Gray Davis, former Governor  
13 Pete Wilson, the commissioners of the Board of Prison Terms (BPT  
14 Defendants), Roderick Hickman, Jeanne Woodford, James Gomez (former  
15 CDC Director), Cal Terhune (former CDC Director), Edward Alameida  
16 and Joe McGrath. See Compl., Ashker v. Schwarzenegger et al., No.  
17 C 04-1967 CW (N.D. Cal.) (May 19, 2004 Complaint). The complaint  
18 alleged the following causes of action: (1) violation of First  
19 Amendment freedom to associate with members of the Aryan  
20 Brotherhood, (2) violation of First Amendment freedom of speech for  
21 not allowing hard-cover books, (3) violation of Fifth Amendment  
22 freedom against self-incrimination for CDC's debriefing

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24 <sup>1</sup> A federal court must conduct a preliminary screening in any  
25 case in which a prisoner seeks redress from a governmental entity  
26 or officer or employee of a governmental entity. 28 U.S.C.  
27 § 1915A(a). In its review, the court must identify any cognizable  
28 claims and dismiss any claims that are frivolous, malicious, fail  
to state a claim upon which relief may be granted or seek monetary  
relief from a defendant who is immune from such relief. 28 U.S.C.  
§ 1915A(b)(1), (2).

1 requirement, (4) violation of Eighth Amendment prohibition of cruel  
2 and unusual punishment, also arising from the debriefing  
3 requirement, (5) violation of the Due Process and Equal Protection  
4 clauses of the Fourteenth Amendment and of the ex post facto clause  
5 for retention in the SHU on indeterminate status based upon gang  
6 association, (6) violation of the Equal Protection clause of the  
7 Fourteenth Amendment based upon alleged discrimination against  
8 white inmates, and (7) supplemental State law claims. On October  
9 19, 2004, the Court issued a screening order pursuant to 28 U.S.C.  
10 § 1915A holding that, for the purposes of initial review, all  
11 Plaintiffs' claims were cognizable.

12 On January 31, 2005, in case no. C 04-1967 CW, all Defendants  
13 moved, pursuant to Federal Rule of Federal Procedure 12(b), to  
14 dismiss the complaint for failure to exhaust administrative  
15 remedies. BPT Defendants Daly, Lawin, Lehman, Roos, Welch,  
16 Granlund, Starn, Risen and Moore also moved, pursuant to Federal  
17 Rule of Civil Procedure 56, for summary judgment on the grounds of  
18 absolute and qualified immunity.

19 On June 2, 2005, this Court issued an order denying Defendants'  
20 motion to dismiss Ashker's second cause of action for violation of  
21 his First Amendment right to freedom of speech arising from the  
22 prison's policy of not allowing hard-cover books in the SHU and  
23 granting the motion to dismiss Plaintiffs' remaining claims without  
24 prejudice for failure to exhaust. The Court also granted BPT  
25 Defendants' motion for summary judgment based on their absolute and  
26 qualified immunity from Plaintiffs' damages claims.

27 On August 11, 2005, Plaintiffs filed this complaint against all  
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1 Defendants whom they had sued in case no. C 04-1967 CW with the  
2 exception of BPT Defendants. Plaintiffs allege that they have now  
3 exhausted the claims that were dismissed for failure to exhaust in  
4 case no. C 04-1967 CW and that these claims may now proceed on the  
5 merits. The complaint alleges the following causes of action:  
6 (1) violation of Fifth Amendment freedom against self-incrimination  
7 for CDC's debriefing requirement, (2) violation of Eighth Amendment  
8 prohibition of cruel and unusual punishment, also arising from the  
9 debriefing requirement, (3) violation of the Due Process and Equal  
10 Protection clauses of the Fourteenth Amendment and of the ex post  
11 facto clause for retention in the SHU on indeterminate status based  
12 upon gang association, (4) violation of the Equal Protection clause  
13 of the Fourteenth Amendment based upon alleged discrimination  
14 against white inmates, (5) violation of First Amendment freedom of  
15 speech for delays in the processing of Plaintiffs' mail, a ban on  
16 hard-cover books and on certain periodicals, including those that  
17 show frontal nudity, (6) violation of First Amendment freedom to  
18 associate with members of the Aryan Brotherhood, and (7)  
19 supplemental State law claims.

20 DISCUSSION

21 Plaintiffs' causes of action in this complaint are the same as  
22 those set forth in their May 19, 2004 complaint (case no. C 04-1967  
23 CW) with the exception of two additional First Amendment claims:  
24 (1) delays in processing of Plaintiffs' mail, and (2) bans on  
25 certain periodicals, including "biker lifestyle [magazines], i.e.  
26 Easyrider, Biker, Outlaw Biker," and "skin art [magazines], i.e.,  
27 Tattoo, Flash, Tabu Tattoo, and Savage Tattoo." Compl. at 36.

## 1 I. Identical Legal Claims

2 The legal claims that are identical to those that were screened  
3 by the Court in the October 19, 2004 screening order are cognizable.  
4 Defendants' request that the Court screen these claims is DENIED as  
5 moot because the Court has already done so.

## 6 II. Additional First Amendment Claims

## 7 A. Mail Processing Delays

8 Plaintiffs allege that Defendants violated Plaintiffs' First  
9 Amendment rights by lengthy mail processing delays.

10 Prison inmates enjoy a First Amendment right to send and  
11 receive mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995)  
12 (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). Prison  
13 officials have a responsibility to forward mail to inmates promptly.  
14 Bryan v. Werner, 516 F.2d 233, 238 (3d Cir. 1975). Allegations that  
15 mail delivery was delayed for an inordinate amount of time are  
16 sufficient to state a claim for violation of the First Amendment.  
17 Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996). Any  
18 practice or regulation which unduly delays an inmate's incoming mail  
19 must accordingly be reasonably related to legitimate penological  
20 interests. See Turner v. Safley, 482 U.S. 78, 89 (1987). These  
21 interests include "security, order, and rehabilitation." Procunier  
22 v. Martinez, 416 U.S. 396, 413 (1974), overruled on other grounds,  
23 Thornburgh v. Abbott, 490 U.S. 401 (1989).

24 Plaintiffs' claim of lengthy mail processing delays is  
25 cognizable.

## 26 B. Ban on Certain Periodicals

27 Plaintiffs allege that biker life-style and skin art magazines  
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1 are the only magazines available that keep them abreast of current  
2 events regarding issues of particular interest and value to them.  
3 Plaintiffs allege that they had access to such magazines for over  
4 twenty years in CDC prisons until 2002 when Defendants banned them  
5 because of frontal nudity and "contraband and serious rules  
6 violations." Compl. at 36-37.

7 Regulations limiting prisoners' access to publications or other  
8 information are valid only if they are reasonably related to  
9 legitimate penological interests. Thornburgh v. Abbott, 490 U.S.  
10 401, 413 (1989) (citing Turner, 482 U.S. at 89). There are four  
11 factors to consider when determining whether a regulation is  
12 reasonably related to legitimate penological interests: (1) whether  
13 there is a "valid, rational connection between the prison regulation  
14 and the legitimate governmental interest put forward to justify it";  
15 (2) "whether there are alternative means of exercising the right  
16 that remain open to prison inmates"; (3) "the impact accommodation  
17 of the asserted constitutional right will have on guards and other  
18 inmates and on the allocation of prison resources generally"; and  
19 (4) the "absence of ready alternatives", or, in other words, whether  
20 the rule at issue is an "exaggerated response to prison concerns."  
21 Turner, 482 U.S. at 89-90.

22 Plaintiffs allege that Defendants have arbitrarily and without  
23 reasonable penological justification denied Plaintiffs access to  
24 these magazines in violation of the First Amendment and of  
25 California Penal Code §§ 2600 and 2601 regarding prisoners'  
26 entitlement to receive any and all magazines that are available to  
27 the public except materials deemed "obscene." Compl. at 52. This  
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1 claim is cognizable.

2 CONCLUSION

3 For the foregoing reasons, Defendants' motion to screen  
4 complaint (Docket no. 4) is GRANTED in part and DENIED in part as  
5 moot. The Court finds that all of Plaintiffs' claims are  
6 cognizable. Defendants shall file an answer to the complaint or  
7 other responsive pleading within sixty days of the date of this  
8 Order.

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10 IT IS SO ORDERED.

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12 Dated: 10/12/05



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CLAUDIA WILKEN  
United States District Judge